AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr. Appeal No.952/2003

APPELLANT	Mukesh Kumar S/o Baldau Caste Lodhi Aged 21 years Resident village Barga, P.S. Khamhariya, District – Durg (C.G.)
	Versus
RESPONDENT	State of Chhattisgarh through P.S. Khamhariya, District – Durg (C.G.).

Appearance:

Ms. Nirupama Bajpai, counsel for the appellant.

Shri V.V.S.Murthy, Dy. Advocate General for the State.

ORAL JUDGMENT
(24.05.2007)

SUNIL KUMAR SINHA, J.

Heard.

This appeal is directed against the judgment of conviction and order of sentence dated 2.4.2003 passed in S.T.No.128/2002 by the Court of Fifth Additional Sessions Judge, Durg(CG). The said Court held the appellant guilty of the offence punishable under Sections 363, 366 & 376 IPC and sentenced him to undergo R.I. for 3 years under Section 366 IPC and R.I. for 7 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 3 months under Section 376 IPC, however, no separate punishment was awarded under Section 363 IPC.

The case of the prosecution is that the prosecutrix namely-Ku.Lata Sahu (PW-3), aged about 15 years, was residing with her parents in village Borai. She was student of class 7th. The appellant was a truck driver, who used to come to her village. She came in contact with the appellant and on 15.12.2001, in the midnight; she took departure from the guardianship of her parents, accompanied the appellant and went along with him to Raipur in his truck. There she was kept by the appellant as his wife in a rented house and after

few days, the appellant took her to village Lalpur to the house of his maternal uncle, who denied to give them shelter and called the village Kotwar, who took them to Police Station, Saja from where they were brought to Police Station Pulgaon. By that time, a missing report was lodged in the said Police Station by the brother of the prosecutrix, which was recorded in *Roznamcha Sana* dated 17.12.2001. Based on such report, after the recovery, the First Information Report Ex.P/6 was registered and the investigation commenced. The girl was sent for medical examination and was examined by Dr.(Smt.) Shyamli Rai (PW-9), who prepared her report Ex.P/11. She clinically observed the age of the prosecutrix as 13-15 years and referred the matter for radiological examination, which was conducted by Dr. A.K.Sahu (PW-6), who prepared his report Ex.P/4, according to which, Lata was found to be aged about 15 years. Besides the above, School admission register was seized. As per the entry of the said register, the date of birth of the girl was 14.7.1988, according to which, she would be aged about 13 ½ years. The girl made allegations that she was subjected to sexual intercourse by the appellant during her long stay with him(for one month and 8 days), therefore, after taking the statements of the mother, father and other witnesses, a charge sheet under Sections 363, 366 and 376 IPC was filed against the appellant. After completion of the trial, the Sessions Judge convicted and sentenced the appellant as aforementioned.

The conviction of the appellant is based upon evidence of age of the prosecutrix. The trial Court recorded a finding that the prosecutrix was aged about 15-15 ½ years on the date of incident, therefore, even on her such conduct, the appellant shall be liable for punishment under the said Sections of IPC.

On the point of age, the evidence of mother and father has been recorded. Kamlabai (PW-1), who is the mother of the prosecutrix, has stated in para 1 that the age of her daughter was in between 13-14 years. In the cross-examination, vide para 3, she has stated that she is illiterate and she cannot tell the dates of birth of her children. She deposed that she had told the date of birth to the Kotwar at the time

(41)

of birth itself. She has also deposed that the police has not at all recorded her statement in this case. Next evidence is that of father Ramadhan (PW-2). He has also deposed vide para 1 that Lata was aged about 14 years. But he has most specifically deposed vide para 5 of his cross-examination that he does not know the date of birth of any of his children. He admitted that the age of the girl, which he told in the examination in-chief, was on the basis of speculation.

Apart from the above evidence, the Head Master (PW-4) has proved the copy of School Admission Register (Ex.P/3). He has also admitted in his cross-examination that according to information contained in the admission register, the entry made in that register was based upon some transfer certificate, that is to say, that the said entry was not based upon declaration form produced by the parents of the girl in their institution, as the girl was admitted on 3/7/2000 in class 6th and had left their institution on 9.1.2002 while studying in class 7th. Therefore, the actual basis of the entry, so made, was not a declaration, but a presumption can be drawn that it was made on the basis of some earlier transfer certificate, which may have been produced before the authority of the School, in which, the date of birth of the child may have been entered as 14.7.1988, but those documents have not been produced by the prosecution to substantiate or validate the entry made in this Register and only a copy of the register has been produced, which was proved by the testimony of PW-4.

Other evidence is the Ossification Test report (Ex.P/4) prepared by Dr.A.K.Sahu (PW-6). According to him, the prosecutrix was aged about 15 years on 22.1.2002.

If we appreciate these evidence to determine the age of the prosecutrix, it would appear that in fact, the mother and father have not been able to give a correct date of birth. They have simply deposed that their daughter was aged about 14 years and in their cross-examination, both have said that they can not tell the date of birth of their daughter and the father has most specifically added that he has deposed the age as 14 years on speculation. About the

(42)

mother, similar situation is there, but she has further added that the Police has not recorded her statement in this case. So, the net outcome of this evidence would be that they are unable to tell the correct age of their daughter and further the age of their daughter, about 14 years, was told by them based upon speculations and no finality can be attached on such evidence. About the entries in School Register, as observed above, the basis of such entry has not been brought on record by the prosecution and such entry would not be of much value. I am fortified in my views by the judgments rendered in the matter of ***Umesh Chandra Vs. State of Rajasthan (AIR 1982 SC 1057) and in the matter of Raunki Saroop Vs. State (AIR 1970 Punjab and Haryana 450) para 15***, that entries in the School Register are not of much value unless there is evidence to show that on what material and at whose instance, it is based. In this case, the prosecution has been failed to adduce such evidence and much reliance cannot be placed on these entries. About the Ossification Test, in the Modi's Jurisprudence (20th Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be up to 3 years on either side. Dr. A.K.Sahu (PW-6) has also concurred to this opinion given in Modi's Jurisprudence and has admitted in para 3 that a possibility of difference of 3 years in such determination may be there. Therefore, if we add 3 years on positive side on the age determined by the radiologist, the age of the prosecutrix may come to 18 years.

Therefore, on appreciation of all the evidence referred to above, pertaining to the age, it cannot be held that the prosecution has proved that the proseuctrix was below 16 years of age on the date of incident. However, it comes that she was in between 16-18 years on the basis of evidence adduced by the prosecution.

43

Therefore, looking to the evidence of age and conduct of the prosecutrix, an offence under Section 376 IPC would not be made out in this case and the appellant deserves to be acquitted of the charges framed under Section 376 IPC.

In the result, the appeal is partly allowed.

The conviction and sentence awarded to the appellant under Section 376 IPC is set aside. He is acquitted of the charge framed under Section 376 IPC. However, his conviction and sentence awarded under Sections 363 and 366 IPC are maintained.

The appeal is partly allowed to the extent indicated above.

Sd/-
Sunil Kumar Sinha
Judge

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